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No. 02-1794

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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TABLE OF CONTENTS

		Page
A.	The government has a paramount interest in being able to search gas tanks without a requirement of reasonable suspicion	1
B.	The nation's history supports the power of customs officials to conduct border searches through the use of force or disassembly	6
C.	A gas tank search imposes a minimal intrusion on individual interests	9

TABLE OF AUTHORITIES

Cases:

Atwater v. *City of Lago Vista*, 532 U.S. 318 (2001) 4
Baker v. *Employers Fire Ins. Co.*, 201 So. 2d 349 (La. Ct. App. 1967) 14
Boyd v. *United States*, 116 U.S. 616 (1886) 7
Cardwell v. *United States*, 417 U.S. 583 (1974) 9
Carroll v. *United States*, 267 U.S. 132 (1925) 8, 9
Charter Oak Fire Ins. Co. v. *Trio Realty Co.*, No. 99-10827, 2002 WL 123506 (S.D.N.Y. Jan. 31, 2002) 14
Glen Falls Ins. Co. v. *Danville Motors, Inc.*, 333 F.2d 187 (6th Cir. 1964) 14
Illinois v. *Lidster*, 124 S. Ct. 885 (2004) 9
Indiana Consol. Ins. Co. v. *Mathew*, 402 N.E.2d 1000 (Ind. Ct. App. 1980) 14
Maul v. *United States*, 274 U.S. 504 (1927) 7
Meridian Mut. Ins. Co. v. *Purkey*, 769 N.E.2d 1179 (Ind. Ct. App. 2002) 14
Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444, (1990) 4
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 4

Cases—Continued: Page

Starks Food Markets v. *El Dorado Ref. Co.*, 134 P.2d 1102 (Kan. Ct. App. 1943) 14
State ex rel. Cox v. *Sims*, 77 S.E.2d 151 (W. Va. 1953) 14
Stephens v. *State*, 447 S.E.2d 26 (Ga. Ct. App. 1994), cert. denied, No. 94C1803 (Ga. Nov. 18, 1994) 14
United States v. *Fimbres*, 49 Fed. Appx. 726 (9th Cir. 2002), cert. denied, 123 S. Ct. 1645 (2003) 3
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 4
United States v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002) 11, 13, 14
United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 2, 10
United States v. *Ramsey*, 431 U.S. 606 (1977) 12
United States v. *Rivas*, 157 F.3d 364 (5th Cir. 1998) 11
United States v. *Robles*, 45 F.3d 1 (1st Cir.), cert. denied, 514 U.S. 1043 (1995) 5
United States v. *Ross*, 456 U.S. 798 (1982) 8, 9
United States v. *Valenzuela-Gonzalez*, No. 00-50215, 2000 WL 1875819 (9th Cir. Dec. 26, 2000) 3
United States v. *Villamonte-Marquez*, 462 U.S. 579 (1983) 7, 8
Vermonia Sch. Dist. 47J v. *Action*, 515 U.S. 646 (1995) 7
Witt v. *United States*, 287 F.2d 389 (9th Cir. 1961) 3
Wyoming v. *Houghton*, 526 U.S. 295 (1999) 7, 8, 9

Constitution and statutes:

U.S. Const. Amend. IV 6, 8, 10
Act of Aug. 4, 1790, ch. 35, 1 Stat. 145:
§ 29, 1 Stat. 164 6
§ 30, 1 Stat. 164 6
§ 31, 1 Stat. 164 ..... 6, 7
§ 47, 1 Stat. 169-170 7
§ 48, 1 Stat. 170 7

Statutes—Continued: Page

Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43 8
Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662 7
19 U.S.C. 1581(a) 12

Miscellaneous:

Crossing the Border (visited Jan. 30, 2004) <http://www.bytheborder.com/cgi-bin/english/traffic/index.cgi> 13
Gail Repsher Emery, *SAIC Wins $15 Million Cargo Inspection Contract*, Washington Technology, May 22, 2001 <http://www.washingtontechnology.com.news/1_1/daily_news/16590-1.html> 6
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SAIC, *VACIS: SAIC's Vehicle and Cargo Inspection System* (2002) <http://www.saic.com/products/security/pdf/VACISbrochure.pdf> 6
SAS R&D Servs., *The Buster K910B* (2000) <http://www.sasrad.com/catalogues/buster.pdf> 5
U.S. Customs & Border Protection, Dep't of Homeland Security, *Northern Border Ports of Entry* (visited Jan. 29, 2004)<http://forms.customs.gov/nemo/bordertimes.asp> 13
U.S. Customs Service, *Performance and Annual Report Fiscal Year 2002* 5

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The Ninth Circuit in this case applied its rule that a gas tank, one of the most common means for smuggling contraband, is the one container in a car that border officials may not open without reasonable suspicion. None of the arguments advanced by respondent justifies that significant restraint on the government's ability to protect the border.

A. The Government Has A Paramount Interest In Being Able To Search Gas Tanks Without A Requirement Of Reasonable Suspicion

1. Respondent argues that customs officials are likely to be interested in searching a gas tank only when they suspect that the tank is concealing contraband, and that the Ninth Circuit's decision leaves officials free to conduct the search when they have a reasonable suspicion. Br. 4-5, 9, 39, 41-44. Respondent underestimates the governmental interest in the ability

of customs officials to conduct thorough searches of gas tanks without reasonable suspicion. The power to search at the border without any particularized suspicion is instrumental in vindicating the sovereign's intrinsic and essential interest in preventing smuggling into this country and in protecting the Nation's border and its citizens. To that end, customs officials may search an international traveler's outer clothing, pockets, shoes, purses, wallets, and baggage, as well as vehicular trunks, passenger compartments, and any closed containers stored in the trunk or passenger compartments. U.S. Br. 13-14. Those "searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant" because they serve the government's overriding interest in securing the border. *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

That interest applies with full force to gas tanks. Gas tanks are already the primary vehicular container used by smugglers along the Southern border to smuggle narcotics, and gas tanks may be used to conceal the smuggling of other items, including instruments of terrorism. U.S. Br. 15-16. Requiring reasonable suspicion to search gas tanks would not only remove a powerful deterrent to smuggling, but because such a requirement does not exist with respect to other vehicular containers and compartments, it would make gas tanks the means of choice for smuggling dangerous or unwanted items and persons into the country. *Id.* at 17-18.[1]

[1] Respondent argues that a search of the gas tank is not necessary to detect alien smuggling because "people cannot be concealed in an operating tank." Br. 5. The point, however, is not that aliens are generally found inside operating tanks holding fuel, but rather, that customs officials need wide authority to search in order to ensure that the gas tank has not been modified to conceal alien smuggling. U.S. Br. 17-18; Pet. App. 15a-17a; see, *e.g. United States* v. *Fimbres*, 49 Fed. Appx. 726, 727 (9th Cir. 2002) (discovery of an "alien concealed in [a van's] modified gas tank compartment"), cert. denied 123 S. Ct. 1645 (2003); *United States* v. *Valenzuela-Gonzalez*, No. 00-50215, 2000 WL 1875819, at *1 (9th Cir. Dec. 26, 2000) (alien found in gas tank compartment).

Those important interests exist whether the search is actually conducted, because the possibility of a search without a reasonable suspicion serves to deter would-be smugglers in the first instance from using the gas tank as means of concealing contraband. Accordingly, the fact "[t]hat the customs authorities do not search every person crossing the border does not mean they have waived their right to do so, when they see fit." *Witt* v. *United States*, 287 F.2d 389, 391 (9th Cir. 1961); see also U.S. Br. 19.

A reasonable suspicion requirement would inevitably lead to fewer gas tank searches and a concomitant increase in gas tank smuggling. Similarly, because the question whether an official had reasonable suspicion to search in any given case is often contested and, at times, decided adversely to the government, a reasonable suspicion requirement may inhibit officers from conducting searches out a fear of personal liability. U.S. Br. 17.

2. Respondent argues that the government may further its interest at the border by using alternative methods to search a gas tank that do not involve the removal and manual search of the tank. Br. 4, 38-42; NACDL Am. Br. 21-26. The Fourth Amendment, however, does not require the government to exhaust every technologically feasible and alternative means of conducting a search when the actual procedure used in a

particular case is reasonable. "[F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of [law enforcement] officers." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 453-454 (1990). This Court accordingly has repeatedly declined to consider whether the government could employ a less intrusive means to accomplish its legitimate law enforcement objectives. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 350 (2001) ("a least-restrictive-alternative limitation * * * is * * * one of those * * * rules[] generally thought inappropriate in working out Fourth Amendment protection" (citation omitted)); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (refusing to consider "a list of less drastic and equally effective means of addressing the Government's concerns") (internal quotation marks omitted)); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.").

Such an inquiry would be particularly inappropriate in a context in which the government's interest is at its apex and the creativity of smugglers requires constant vigilance on the part of border officials. Customs officials should be given wide latitude to chose which method of searching a gas tank best serves the interests of border security.

Requiring the government to use alternative means to ascertain the contents of a gas tank would also undermine the government's ability to prevent smuggling through gas tanks. The most effective and reliable way

to ascertain what is inside a gas tank, like any other container, is actually to open it. The alternative search techniques posited by respondent are not available to customs officials at all times and at all border ports of entry, and each technique has its limitations. For example, narcotics dogs may fail to alert to narcotics hidden within a gas tank. U.S. Br. 16. Such dogs, whether trained to detect narcotics or explosives, will not alert to other forms of hidden contraband (*e.g.*, nerve agents, toxins). Similarly, the use of fiber-optic scopes will not be effective in the many tanks that contain manufacturer-installed devices that block the insertion of scopes into the tank. *Ibid.*

While advanced equipment such as mobile x-rays and density busters are often very effective in revealing the presence of contraband, "[a]ny single sensor or device may be defeated by a determined adversary." U.S. Customs Service, *Performance and Annual Report Fiscal Year 2002*, at 18; see *id.* at 35 ("[D]rug smuggling organizations are very creative in developing new strategies to try to circumvent Customs efforts."); *United States* v. *Robles*, 45 F.3d 1, 2-3 (1st Cir.) (x-ray of wooden crate holding metal cylinder concealing cocaine "proved inconclusive"), cert. denied, 514 U.S. 1043 (1995). For instance, a density buster detects solids situated only very closely to the outside of an object. SAS R&D Servs., *The Buster K910B* (2000) <http://www.sasrad.com/catalogues/buster.pdf> (describing depth of reading as variable to 6 inches). Accordingly, such equipment would not detect liquid contraband (such as hydriatic acid, a precursor to methamphetamine) and may not detect solid contraband floating or suspended in the tank away from its exterior walls.

Scanning devices that use x-rays or gamma rays also have limited use for many gas tanks. The devices are not designed to image passenger vehicles or their internal compartments, but rather, are designed to image large hollow containers carried typically on tractor-trailers. *E.g.*, SAIC, *VACIS: SAIC's Vehicle and Cargo Inspection System* 6 (2002) <http://www.saic.com/products/security/pdf/VACISbrochure.pdf>. Such equipment is also very expensive, typically costing between $1 and $2 million per device and several hundred thousands of dollars in annual maintenance costs. DMIA Task Force, Dep't of Homeland Security, *Data Management Improvement Act Task Force Second Annual Report to Congress* (Dec. 2003) <http://www.uscis.gov/graphics/shared/lawenfor/bmgmt/inspecRprt2Chapter5.pdf>; Gail Repsher Emery, *SAIC Wins $15 Million Cargo Inspection Contract*, Washington Tehnology, May 22, 2001 <http://www.washingtontechnology.com/news/1_1/daily_news/16590-1.html>. Those devices are accordingly of limited availability and are allocated to high priority uses and locations.

B. The Nation's History Supports The Power Of Customs Officials To Conduct Border Searches Through The Use Of Force Or Disassembly

Respondent erroneously argues that customs officials historically had no power to use force or disassembly in order to conduct a suspicionless border search. Br. 25-32; accord NACDL Am. Br. 8-11.

The same Congress that passed the Fourth Amendment explicitly permitted customs officials to board ships and vessels "for the purposes * * * of examining and searching" the ships and vessels and to "examine the cargo or contents" of those conveyances as they

entered this country. Act of Aug. 4, 1790, ch. 35, §§ 30, 31, 1 Stat. 164; see § 29, 1 Stat. 164 (permitting customs officials to "examine[]" unloaded parcels and packages containing dutiable items). This Court has recognized that the Nation's earliest laws authorized "the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid," and "[t]he search for and seizure of * * * goods liable to duties and concealed to avoid the payment thereof." *Boyd* v. *United States*, 116 U.S. 616, 623 (1886); accord *Maul* v. *United States*, 274 U.S. 501, 505 (1927) (explaining that customs officials had power to "board and search vessels bound to the United States and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in"); U.S. Br. 21. Those laws imposed no requirement of suspicion in order to search. Indeed, Congress in 1799 confirmed that customs officials had the power, "whenever" they "shall think proper," to search the baggage of international travelers. Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662.[2]

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[2] Respondent errs in relying (Br. 27) on Section 47 of the 1790 Act, which provided that "on suspicion of fraud" customs officials must open packages in the presence of "two or more reputable merchants." Act of Aug. 4, 1790, ch. 35, § 47, 1 Stat. 169-170. That authority was not limited to the border and did not purport to limit the authority explicitly conferred by other provisions of the Act that applied at the border. The same is true with respect to Section 48 of the Act, 1 Stat. 170, also relied upon by respondent (Br. 27-28). See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 586 n.4 (1983) (explaining that "nothing in [Section 48] can be read to limit" the authority to board vessels conferred by Section 31); U.S. Br. 22 n.2. Respondent similarly is incorrect in contending (Br. 28) that *Wyoming* v. *Houghton*, 526 U.S. 295, 301 (1999), and Justice O'Connor's dissenting opinion in *Vernonia*

The framers of the Fourth Amendment could not have intended for customs officials to conduct thorough searches of ships, cargo, and baggage to look for dutiable items without the power to use force or disassembly. "[C]ertainly Congress intended customs officers to open shipping containers when necessary and not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed." *Wyoming* v. *Houghton*, 526 U.S. 295, 301 (1999) (quoting *United States* v. *Ross*, 456 U.S. 798, 820 n.26 (1982)). Similarly, in authorizing officials to examine and search ships entering the country, Congress intended customs officials to search hidden places (such as floor planks or false compartments on ships) where dutiable items or contraband could be shielded from revenue officers. C.E. Prince & M. Keller, Dep't of the Treasury, *The U.S. Customs Service: A Bicentennial History* 225, 230 (1989) (discussing customs officials' discovery in early 1900s of opium smuggled at the border "in tins of dry paint or tobacco, under floors, in furniture—even stashed in the boots or on the persons of passengers and crew," and "in 400 tins hidden in the hollow wall of another vessel").

The power to search for hidden contraband would be rendered meaningless without the authority to use

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School District 47J v. *Acton*, 515 U.S. 646, 671 (1995), concluded that the 1790 Act imposed a requirement of probable cause. Neither opinion stated that probable cause was required at the border. Instead, those cases relied ultimately on the analysis in *Carroll* v. *United States*, 267 U.S. 132, 150-151 (1925), which concerned primarily the Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43, and not the provisions discussed above and in *Villamonte-Marquez*, 462 U.S. at 584-585. Moreover, *Carroll*, 267 U.S. at 154, explicitly recognized that vehicles may be stopped and searched at the border without suspicion.

force or disassembly to inspect a vehicle for hidden contraband. Contraband smuggled within a vehicle is almost always "enclosed within some form of container." *Ross*, 456 U.S. at 820. "During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Wyoming* v. *Houghton*, 526 U.S. at 301 (quoting *Ross*, 456 U.S. at 820 n.26). Customs officials thus regularly use some force or disassembly when conducting searches of closed compartments and containers at the border; that use of force falls within the traditional authority of customs officials to conduct border searches without reasonable suspicion. U.S. Br. 29-30.

C. A Gas Tank Search Imposes A Minimal Intrusion On Individual Interests

1. Respondent argues that a search of a vehicle "is a substantial invasion of privacy" and that a gas tank search "is neither expected nor welcome." Br. 18, 34 (quotation marks omitted). "The Fourth Amendment does not treat a motorist's car as his castle," *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004), however, because a vehicle "seldom serves as one's residence or as the repository of personal effects," *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974). That is particularly true with respect to the vehicle's gas tank, which is intended solely to serve as a repository for fuel. Indeed, respondent concedes that customs officials can, without any level of suspicion, search the inside of a gas tank through x-rays, density-busters, and the forcible placement of a scope inside the tank. See Resp. Br. 40-41.

The act of disassembly and opening the tank likewise does not invade the motorist's privacy interests.

The motorist's expectation of privacy is also "less at the border." *Montoya de Hernandez*, 473 U.S. at 539. Thus, whatever "inconvenience and indignity" may be caused by a stop of a vehicle traveling in the interior, "[t]ravellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U.S. 132, 154 (1925). Thus, motorists crossing the border should reasonably expect that customs officials, if they see fit, may search compartments and containers within the vehicle, including the gas tank, in order to deter and prevent smuggling at the border.[3]

Respondent attempts to equate a gas tank search that involves force and disassembly with the destructive drilling of holes into vehicular compartments, an action that some lower courts have treated as requiring reasonable suspicion. Br. 4, 9-10, 12-13, 36-37. Respondent also argues that some other searches of property likewise should require reasonable suspicion, such as a search that involves smashing a vase, Br. 14, or the dismantling of an entire vehicle, Br. 7, 15. None of those arguments, however, supports the imposition of a reasonable suspicion requirement for a gas tank search.

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[3] Respondent erroneously relies on the fact that a gas tank search involves a seizure. Br. 34-35. The incidental seizure of the car, however, is "reasonable" within the meaning of the Fourth Amendment for the same reason that the "search" is reasonable. Officers necessarily must effect a temporary seizure in order to carry out the search.

As an initial matter, certain searches involving damaging force, such as the exploratory drilling of a small hole into a frame of an auto-transport trailer, *e.g.*, *United States* v. *Rivas*, 157 F.3d 364, 366 (5th Cir. 1998), may cause such minimal damage to the motorist's property that a reasonable suspicion requirement would be unwarranted. Cf. *United States* v. *Molina-Tarazon*, 279 F.3d 709, 714 (9th Cir. 2002) ("For example, if the lock is jammed on a suitcase or its owner refuses to present a key, [customs] agents have to employ some degree of force to gain access to its interior."). And even assuming that some searches involving drilling must be preceded by reasonable suspicion, that type of search involves the intentional use of *destructive* force in order to complete the search. A gas tank search, by contrast, involves *disassembly* and *reassembly*, not the deliberately destructive use of force. See *Id.* at 719 (Brunetti, J. concurring) ("There is a very real distinction between the removal or disassembly of part of an automobile in the ordinary course of inspection, and the application of destructive force in order to facilitate inspection. * * * This inspection was conducted in a matter of 10-15 minutes with no permanent alteration or resulting harm to Molina-Tarazon's vehicle.").

Nor is a gas tank search comparable to the extreme hypothetical scenario where officials might "order a car disassembled down to the last o-ring, and hand it back to the owner in a large box." Resp. Br. 15 (quoting *Molina-Tarazon*, 279 F.3d at 713). Even assuming that some level of suspicion would be necessary before subjecting the motorist to the significant delay, inconvenience, and the resulting potential for impairing the value of the vehicle, a gas tank search involves a brief

procedure that can be reversed without damaging the safety or operation of the vehicle. U.S. Br. 25-27.

For similar reasons, a gas tank search does not remotely resemble the complete destruction of property in respondent's hypothetical of "smash[ing] a vase to view its contents." Resp. Br. 14. That example also involves the *gratuitous* damage to property, because customs officials presumably may ascertain the contents of the vase without destroying it simply by looking inside. This Court has left open "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." *United States* v. *Ramsey*, 431 U.S. 606, 618 n.13 (1977); see also 19 U.S.C. 1581(a) (customs officers may use "all *necessary* force to compel compliance" with authority to search) (emphasis added). Respondent has never argued, however, that the search in this case was unreasonable because of a particular manner in which the disassembly was executed or that unnecessary force was used to open the gas tank. Rather, respondent has relied on *Molina-Tarazon*'s per se imposition of reasonable suspicion requirement for gas tank searches that involve removal of the tank from the vehicle. Statement of Facts and Mem. of Points and Authorities in Support of Def. Motion 2 (June 4, 2002) ("Because the inspectors in this case removed the gas tank while searching the car, their actions amounted to a non-routine border search.").[4]

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[4] Respondent similarly has not challenged the search because the customs official testified that he hammered off bondo from the tank and in so doing "slightly scratched" and "possibly slightly dented" the tank. Pet. App. 8a.

2. Respondent contends that a gas tank search should require reasonable suspicion because it is "labor intensive," "potentially lengthy," and requires "specialized labor, skills and tools." Br. 17. None of those factors renders a border search of property so highly intrusive as to trigger a requirement of reasonable suspicion. Those factors may be equally present with the search techniques that respondent concedes may be employed at the border without reasonable suspicion (such as x-rays, fiber-optic scopes, and density busters). *Id.* at 40-41. Customs officials with highly specialized training and knowledge regularly inspect items, cargo, and conveyances at the border with some incidental delay, and border officials must regularly use force or tools to complete a thorough search of a vehicle. U.S. Br. 27, 29-30.

Moreover, a delay associated with a gas tank search is not unreasonable under the circumstances. Here, a mechanic arrived within 20 to 30 minutes; the entire process of elevating respondent's vehicle and disconnecting the tank was completed within 10 to 15 minutes; and the search of the tank and discovery of the drugs took only an additional 5 to 10 minutes. U.S. Br. 3, 27. Such delays at the international border are common and to be expected.[5]

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[5] See *Crossing the Border* (visited Jan. 30, 2004) <http://www.bytheborder.com/cgi-bin/english/traffic/index.cgi average wait times at San Ysidro and Otay Mesa ports for entry is 0-30 minutes for 0-60 vehicles per lane; 30-60 minutes for 60-120 vehicles per lane; 60-90 minutes for 120-180 vehicles per lane; and 90-120 minutes for 180-240 vehicles per lane); U.S. Customs & Border Protection, Dep't of Homeland Security, *Northern Border Ports of Entry* (visited Jan. 29, 2004) <http://forms.customs.gov/nemo/bordertimes/bordertimes.asp> (at 6:00 a.m., delay of 50 minutes at San Ysidro and delay of 25 minutes at Otay Mesa).

3. Respondent argues that "a gas tank disassembly raises issues of danger" because there is the possibility of error "in removing, disassembling and then reassembling" the gas tank and it is "common sense" that a "fuel leak [could] cause[] a fire or explosion." Br. 21-22 (quoting *Molina-Tarazon*, 279 F.3d at 715). Respondent's amicus similarly asserts that the mechanic or the vehicle may be injured if the search is not performed by trained professionals using safe procedures and equipment. NACDL Br. 14-21.

Concerns about the possibility of mechanic error do not justify the court of appeals' decision. Respondent cites not a single accident involving the vehicle or motorist in the many thousands of gas tank disassemblies that have occurred at the border. Moreover, customs officials conduct such searches in a reasonable manner with due regard to safety by having qualified professionals perform the search. U.S. Br. 15, 31.[6]

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[6] None of the decisions cited by amicus NACDL (Br. 13 n.11) involves the danger and fear cited by the Ninth Circuit in *Molina-Tarazon*, 279 F.3d at 716-717: a negligently reassembled fuel tank malfunctioning on the road. Four decisions did not even involve malfunctioning vehicular gas tanks. *Stephens* v. *State*, 447 S.E.2d 26, 28 (Ga. Ct. App. 1994) (arson), cert. denied, No. 94C1803 (Ga. Nov. 18, 1994); *Indiana Consol. Ins. Co.* v. *Mathew*, 402 N.E.2d 1000, 1001-1002 (Ind. Ct. App. 1980) (lawnmower fire); *Baker* v. *Employers' Fire Ins. Co.*, 201 So. 2d 349, 350 (La. Ct. App. 1967) (fire from unknown origin); *Starks Food Markets* v. *El Dorado Refining Co.*, 134 P.2d 1102, 1103-1104 (Kan. Ct. App. 1943) (gasoline truck). The remaining decisions involved the repair of malfunctioning fuel tanks either by a non-mechanic, *Meridian Mut. Ins. Co.* v. *Purkey*, 769 N.E.2d 1179, 1180-1181 (Ind. Ct. App. 2002), or by mechanics who did not follow safe procedures, *Charter Oak Fire Ins. Co.* v. *Trio Realty Co.*, No. 99-10827, 2002 WL 123506, at *1, *5 (S.D.N.Y. Jan. 31, 2002) (a pilot light on a water heater that violated fire codes ignited gasoline during repair work on a fuel pump); *Glen Falls Ins. Co.* v. *Danville Motors, Inc.*, 333 F.2d 187, 188-189 (6th Cir. 1964) (fire began when mechanic negligently siphoned gas from leaky tank into open container); and *State ex rel. Cox* v. *Sims*, 77 S.E.2d 151, 154 (W. Va. 1953) (fire broke out while leaking gasoline was spread over large area of floor).

There is no reason to doubt that customs officials will continue to act appropriately to ensure that gas tank searches are performed competently and in a manner designed to protect the safety of their own employees participating in the search. Particularly in the absence of known instances of either error or injury at the border associated with a gas tank search, the Ninth Circuit was unjustified in concluding that a gas tank search was unreasonably dangerous or would unreasonably cause the motorist to fear for his safety. Absent a substantial basis for a concern that a motorist would be subjected to a significant risk of harm as a result of a gas tank search, the Ninth Circuit's unprecedented requirement of reasonable suspicion to open and search a gas tank is unfounded.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the court of appeals' decision should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2004